82-659

No.

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In the Supreme Court of the United States

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,
Petitioner

v.

DONALD EUGENE GARDNER et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JONATHAN VIPOND, III*
JASON W. MANNE
Attorneys for Petitioner
*Counsel of Record

Office of Legal Counsel
Department of Public Welfare
Room 323 Health & Welfare Bldg.
Harrisburg, PA 17120
(717) 787-6625

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

QUESTIONS PRESENTED

1. Do Section 522(f) and Section 106(c) of the Bankruptcy Code show a sufficient intent by Congress to set aside the Eleventh Amendment immunity of States in the context of lien avoidance proceedings?

2. May Congress, acting pursuant to the bankruptcy power, set aside the Eleventh Amendment immunity of States?

3. Is a confessed judgment against real estate a "judicial lien" subject to avoidance under 11 U.S.C. §522(f) even though such liens are created by agreement, given for valuable consideration, and have, under Pennsylvania law, most of the legal incidents of a short form mortgage?

TABLE OF PARTIES

A list of parties in the Court below is as follows:

1) Commonwealth of Pennsylvania, Department of Public Welfare

2) Donald Eugene Gardner

3) United States of America

4) Household Finance Consumer Discount Company*

5) York Federal Consumer Discount Company*

6) David S. August, D.D.S.*

It is believed that the parties indicated by an asterisk (*) do not have an interest in this appeal. The clerk will be so notified pursuant to rule 19.6.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,
Petitioner

v.

DONALD EUGENE GARDNER,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Commonwealth of Pennsylvania, Department of Public Welfare petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 685 F.2d 106 (3rd Cir., 1982) and appears in the Appendix (App. infra, 1a-7a). No opinion was rendered by the District Court for the Western District of Pennsylvania (App. infra, 8a). The opinion of the Bankruptcy Court for the Western District of Pennsylvania is not reported but appears also in the Appendix hereto (App. infra, 9a-11a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1982. A petition for rehearing was denied on September 9, 1982. The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 Stat. 928 codified at 28 U.S.C. §1254 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"

Section 522(f)(1) of Title 11 of the United States Code provides as follows:

> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in the property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> (1) a judicial lien; ...."

Section 106(c) of Title 11 of the United States Code provides as follows:

> "(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains 'creditor', 'entity' or 'governmental unit' applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units."

STATEMENT OF THE CASE

Donald Eugene Gardner filed a voluntary petition in bankruptcy on January 15, 1981. Prior to seeking relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §701 *et seq.*, he had received from the Pennsylvania Department of Public Welfare the sum of $19,294.68 in public assistance.

Since Mr. Gardner owned real property he was required by DPW to sign several reimbursement agreements, Forms Pa-9, as a condition of receiving assistance. He signed six of these forms each in the amount of $2,000. Each form contained a confession of judgment provision authorizing the entry of judgment for $2,000 plus costs. A copy of the Form Pa-9 is reproduced in the Appendix (App. 33a-35a).

All six Pa-9 forms were filed with the clerk of courts in York County. They were indexed as judgments against Mr. Gardner's real estate. Five of the six judgments were revived as Pennsylvania law permits. Thus on January 15, 1982, when Mr. Gardner filed bankruptcy, judgments totaling $12,000 were on file and were, under Pennsylvania law, liens on Mr. Gardner's real property in York County. It is agreed that if allowed to stand, all but $650.00 of these liens would impair exemptions provided in Section 522(d) of the Code.

Shortly after filing bankruptcy, Mr. Gardner initiated an adversary proceeding to void DPW's liens. The Bankruptcy Court held that DPW's liens on the

Gardner property were "judicial liens" subject to avoidance under Section 522(f) of the Code. The District Court and the Court of Appeals affirmed.

The Pennsylvania Department of Public Welfare seeks certiorari because the Court of Appeals refused to honor the Commonwealth's Eleventh Amendment defense. Decisions of this Court have made clear that congressional intent to set aside Eleventh Amendment immunities must be clearly expressed. No clear expression by Congress may be found in the context of Section 522(f) of the Bankruptcy Code.

The Pennsylvania Department of Public Welfare also seeks certiorari to determine the scope of congressional power to set aside the Eleventh Amendment immunity of States. DPW asserts that Congress lacks the power to set aside the Eleventh Amendment immunity of states when acting pursuant to its Article I Section 8 powers.

Finally, DPW seeks certiorari to review the statutory issue of whether its liens are "judicial liens" within the meaning of the Bankruptcy Code. Liens of confessed judgments are created by agreement of the parties and, under Pennsylvania law, have most of the legal incidents of a mortgage. Confessed judgments should be classified as "security interest" under the Bankruptcy Code.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decided the Question of Eleventh Amendment Abrogation in a Manner Which Conflicts With Applicable Decisions of This Court

The weight of authority favors what has come to be called the "clear statement" approach to Eleventh Amendment immunity. Under this view, if Congress wishes to subject a state to private suit, it is up to that branch to clearly express its intent to do so. *Freimanis v. Sea-Land Service Inc.*, 654 F.2d 1155 (5th Cir., 1981).

The "clear statement" approach is drawn from this Court's decisions in *Employees of the Department of Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed. 2d 251 (1973); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974); and *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed. 2d 358 (1979).

These decisions consistently refuse to imply congressional intent to abrogate the Eleventh Amendment from an ambiguous statute and uncertain legislative history. Instead they require that a statute "explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States." *Quern*, 440 U.S. at 345. Congress is not presumed to lift the Eleventh Amendment immunity of states silently. *Employees*, 411 U.S. at 284-285. The "threshold fact

of congressional authorization" must be present. *Edelman*, 415 U.S. at 672.

Congress has manifested its intent to partially abrogate the Eleventh Amendment immunity of States in Section 106(c) of the Bankruptcy Code. However the abrogation is explicitly restricted to certain sections of the Bankruptcy Code. Section 106(c) restricts Eleventh Amendment abrogation to provisions of the Bankruptcy code containing the key words "creditor", "entity" or "governmental unit."

The Third Circuit below did not respect Congress' choice of limited abrogation. Instead it extended the reach of Section 106(c) to a provision of the Bankruptcy Code not containing any of the key words. The Court of Appeals held that Pennsylvania could be named as a party defendant in a lien avoidance proceeding under Section 522(f) notwithstanding the fact that Section 522(f) does not contain the words "creditor", "entity" or "governmental unit."

The Circuit states that the legislative history of Section 522(f) suggests that, for purposes of lien avoidance, no distinction was intended between governmental and non-governmental entities. However if one looks at the legislative history cited by the Court below one will see that there is absolutely no indication that Congress even considered the issue of application of Section 522(f) to the States.

It would have been very easy for Congress to write a statute which abrogates the Eleventh Amendment immunity of states completely in bankruptcy. Congress chose not to do so. Congress restricted its attempt at abrogating the Eleventh Amendment to certain provisions of the Bankruptcy Code containing cer-

tain key words. The Court of Appeals ignores this clearly expressed limitation on Eleventh Amendment abrogation and instead finds abrogation in a provision of law not containing the key words chosen by Congress.

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2. The Question of Congressional Power Under Article I Section 8 To Abrogate Eleventh Amendment Immunity Is Important and Should Be Addressed by This Court

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This Court has held that Congress may set aside the Eleventh Amendment immunity of states when acting pursuant to the post-civil war amendments. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed. 2d 614 (1976); *Hutto v. Finney*, 437 U.S. 678, 95 S.Ct. 2565, 57 L.Ed. 2d 522 (1978). The Court has also held that Congress may abrogate Eleventh Amendment immunities when a state constructively consents to abrogation by entering a federally regulated area. *Parden v. Terminal R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 2d 233 (1964). However no decision of this Court has squarely addressed the issue of congressional power under the Article I Section 8 powers when a state has not constructively consented to abrogation.

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3. The Statutory Issue Regarding the Characterization of Confessed Judgments in Bankruptcy Is Important and Should Be Addressed by This Court

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Under Pennsylvania law a confessed judgment against real estate is created by an agreement to enter

judgment. Thus under the Bankruptcy Code a confessed judgment could be characterized as either a lien created by agreement, 11 U.S.C. 101(37), or a judicial lien, 11 U.S.C. 101(28). The Court of Appeals characterized a confessed judgment as a judicial lien.

The Third Circuit has noted that a confessed judgment in Pennsylvania serves "most of the same functions as a mortgage." *In re Ashe*, 669 F.2d 105, 109 (3rd Cir., 1982). Indeed under Pennsylvania law most of the traditional incidents of a judgment are stripped away from confessed judgments. Debtors are given most of the protections of a mortgage. Under Pennsylvania law creditors may not simply execute on a confessed judgment. Instead they must provide notice of an intention to foreclose, followed by an original action akin to foreclosure. Act of June 30, 1974, P.L. 13, No. 6, §407(a), as amended, Act of October 5, 1978, P.L. 1100, No. 258, §1, Pa. Stat. Ann. Title 41, §407(a) (Purdon Supp. 1981-82).

A confessed judgment against real estate, taken as security for a loan, does not pose any of the evils Congress intended to address through Section 522(f)(1). That provision was designed to undo the actions of unsecured creditors who bring legal action against the debtor shortly before bankruptcy. H.R. Rep. 95-595, 95th Cong., 1st Sess. 126, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6087. Section 522(f)(1) places the ordinary judicial lien holder back where he bargained to be: with the unsecured creditors. However the holder of a confessed judgment against real estate who records his judgment at the time he loans money to the debtor is secured from the start. The substance of the transaction is that of a security agreement, not a judicial lien.

The Commonwealth obtains its confessed judgment to secure the repayment of public assistance. The judgment is taken contemporaneously with the disbursement of public assistance funds. The transaction is intended to make DPW a secured creditor. Consequently the Third Circuit erred in holding that such confessed judgments are "judicial liens" subject to avoidance under the Bankruptcy Code.

CONCLUSION

It is respectfully submitted, for the reasons set forth above, that the Petition for a Writ of Certiorari should be granted to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JONATHAN VIPOND, III*
JASON W. MANNE
Office of Legal Counsel
Pennsylvania Department of
Public Welfare
Room 323 Health & Welfare
Bldg.
P. O. Box 2675
Harrisburg, PA 17120
(717) 787-6625
Attorneys for Petitioner
**Counsel of Record*

October 7, 1982

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 81-2898

DONALD EUGENE GARDNER, SR., Debtor
(Bankruptcy No. 81-75)

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE, HOUSEHOLD FINANCE CONSUMER DISCOUNT CO., YORK FEDERAL CONSUMER DISCOUNT CO., AND DAVID S. AUGUST D.D.S., INTERVENOR: UNITES STATES OF AMERICA

Commonwealth of Pennsylvania,
Department of Public Welfare,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA – PITTSBURGH

Argued July 27, 1982

Before: GIBBONS and HUNTER, *Circuit Judges*, and LORD,* *District Judge*

(Opinion Filed August 11, 1982)

Jason W. Manne (Argued)
Assistant Counsel
Department of Public Welfare
Office of Legal Counsel
Room 323 Health & Welfare Bldg.
Harrisburg, Pennsylvania 17120
Attorneys for Commonwealth of Pennsylvania Department of Public Welfare

Eric L. Frank, Esquire (Argued)
Community Legal Services, Inc.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, Pennsylvania 19134

Joseph Colavecchi, Esquire
Two East Market Street
P.O. Box 131
Clearfield, Pennsylvania 16830
Attorneys for Appellee

OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

The Commonwealth of Pennsylvania, Department of Public Welfare (DPW) appeals from an order of the

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* Hon. Joseph S. Lord, III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

district court avoiding liens on the real property of Donald E. Gardner, Sr., pursuant to section 522(f)(1) of the Bankruptcy Code, 11 U.S.C. §522(f)(1) (Supp. III 1979). The Bankruptcy Court held that the DPW liens on Gardner's property at 1005 East Hay Street, York, Pennsylvania, were judgment liens avoidable to the extent that they impaired an exemption under section 522(d) of the Code, and the district court affirmed. DPW contends that its liens are either security interests or equitable or statutory liens, and not judicial liens. Alternatively it contends that if the Bankruptcy Code authorizes the Bankruptcy Court to set aside judicial liens held by a state, it violates the eleventh amendment. We affirm.

Mr. Gardner filed a voluntary petition in bankruptcy on January 15, 1981. Prior to seeking relief under Chapter 7 of the Code, 11 U.S.C. §701 *et seq.*, he had received from DPW $19,294.68 in public assistance. Because Gardner owned real property he was required by DPW to sign reimbursement agreements, Forms PA-9, as a condition to receiving such assistance. He signed six of these forms, each in the amount of $2,000. Each form contains a standard Pennsylvania confession of judgment provision authorizing entry of judgment for $2,000 plus costs, and each provides that the judgment shall be a lien upon Gardner's real property and collected as other judgments. All six forms were filed with the Prothonotary of York County from time to time beginning in October, 1972. Five of the judgment notes were revived, as Pennsylvania law permits. Thus on January 15, 1981, judgment notes totalling $12,000 were on file and were, under Pennsylvania law, liens on all Gardner's real property in York County. Gardner con-

tends, and DPW does not dispute, that if allowed to stand all but $650.00 of these liens would impair exemptions provided in Section 522(d) of the Code. The order appealed from affirms an order avoiding them except to the extent of $650.00.

DPW acknowledges that under *In re Ashe*, 669 F.2d 105 (3d Cir. 1982), a lien obtained by confessed judgment is a judicial lien avoidable under section 522(f)(1) of the Code, and not a security interest or a statutory lien. It urges, first, that *In re Ashe* should be overruled. A panel of this court is not free, however, to overrule a governing precedent in this circuit.

DPW also suggests that *In re Ashe* is distinguishable, in that it considered a judgment lien arising out of a transaction with a private creditor, while the cognovit notes it holds arise out of transactions with the Commonwealth. A proper interpretation of the Bankruptcy Code, DPW urges, is that section 522(f)(1) was not intended to apply to the states. In making that argument DPW must contend with the provision in section 106(c) of the Code which provides:

> Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity--
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units....

DPW makes the ingenious but unpersuasive argument that because section 522(f) does not contain the specific words "creditor", "entity", or "governmental unit", it cannot have been intended to apply to the states. The legislative history of section 522(f) suggests, however, that for purposes of lien avoidance no dis-

tinction was intended between governmental and non-governmental entities. *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 76 (1978) and H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 362 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5862, 6318. In *In re Neavear*, 674 F.2d 1201, 1204 (7th Cir. 1982), the Court concluded that "section 106(c) ... waives the sovereign immunity of the United States with respect to questions relating to the dischargeability of debts owed to the [federal] government." Governmental creditors are for most purposes treated like other creditors, and there is no suggestion that the exemption provisions in Section 522 are to apply to such creditors differently. Thus *In re Ashe*, *supra*, controls as a matter of statutory construction of section 522(f)(1).

In a second effort to distinguish *In re Ashe* DPW urges that although its reimbursement agreement takes the form of a traditional cognovit note, the lien created by the resulting judgment should be disregarded and we should define its lien as either an equitable or a statutory lien. It is neither. Under Pennsylvania law the agreement to charge specific property with the payment of a debt may give rise to an equitable lien. However, the lack of specific identity of the property intended to be affected is fatal to the creation of an equitable security interest in real estate. *In re Griggs*, 12 B.R. 443 (E.D. Pa. 1981); *In re Fortesque*, 122 F. Supp. 883 (E.D. Pa. 1954). *See also*, *Mermon v. Mermon*, 257 Pa. Super. 228, 390 A.2d 796 (1978); 22 P.L.E. *Liens* §3 at 376, 377. *Cf. R. M. Shoemaker v. Southeastern Pa. Economic Development Corp.*, 275 Pa. Super. 594, 419 A.2d 60 (Pa. Super. 1980) (undistributed loan proceeds not identified as collateral). Nor is the DPW a holder of a statutory lien. It has no

lien at all until its cognovit notes are filed with the Prothonotary as judgments. Section 101(35) of the Bankruptcy Code defines a statutory lien as a lien arising solely by force of a statute. It must be a lien arising automatically by operation of a statute, not one requiring subsequent judicial action. Pennsylvania has authorized the DPW to take cognovit notes. It has not provided that the property of recipients of public assistance is automatically subject to a reimbursement lien by operation of law.

Since *In re Ashe* controls as a matter of statutory construction, we must address DPW's eleventh amendment contention. Acceptance of that contention would require turning back the clock more than a half century. *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931), holds that Congress has constitutional authority to grant a bankruptcy court power to deal with the lien of a state. That rule was reiterated in *Gardner v. New Jersey*, 329 U.S. 565, 578 (1946), and has never been doubted since. *See In re Blease*, 605 F.2d 97 (3d Cir. 1979). The *Van Huffel* and *Gardner* decisions were decided years before the Court's reinterpretation of the eleventh amendment in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Hutto v. Finney*, 437 U.S. 678 (1978). Those cases established that if Congress intends to bind the states by a cause of action arising under federal law the eleventh amendment is no bar. *See Peel v. Florida Dept. of Transportation*, 600 F.2d 1070 (5th Cir. 1979); *Jennings v. Illinois Office of Education*, 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979). In section 106(c) of the Code Congress has made clear its intention to subject the states as lienholders to the same treatment in the bankruptcy court as is afforded other creditors. Thus even if the

issue were not settled by *Van Huffel* and *Gardner* the DPW argument would have to be rejected on the authority of *Fitzpatrick* v. *Bitzer* and *Hutto* v. *Finney*. *See also Florida Department of States* v. *Treasure Salvors, Inc.*, 50 U.S.L.W. 5056 (1982).

The judgment appealed from will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-1481

DONALD EUGENE GARDNER,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT CO.; and DAVID S. AUGUST D.D.S.,

Defendants.

ORDER OF COURT

AND NOW, to-wit, this day of October, 1981, following oral argument in the above-entitled bankruptcy appeal, and after careful consideraton of the parties' thorough briefs, it is hereby ORDERED, ADJUDGED, and DECREED that the June 18, 1981 judgment of the United States Bankruptcy Court for the Western District of Pennsylvania at Adv. No. 81-138 be, and hereby is, AFFIRMED. The opinion of Bankruptcy Judge Joseph Cosetti dated June 18, 1981, is adopted as the opinion of this Court.

MAURICE COHILL
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

No. 81-75
Adversary No. 81-138

IN RE: DONALD EUGENE GARDNER, SR.,
Debtor

DONALD EUGENE GARDNER, SR.,
Plaintiff

vs.

COMMONWEALTH OF PENNSYVANIA, DEPARTMENT OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT CO.; and DAVID S. AUGUST, D.D.S.,
Defendants

MEMORANDUM OPINION

On January 15, 1981 the debtor filed a Chapter 7 petition under the Bankruptcy Code. On January 28, 1981 he filed a Complaint to Avoid Liens on a house in York County, Pennsylvania and to avoid a non-possessory, non-purchase money security interest on all household furnishings and goods. A hearing was held on March 6, 1981. On that date an order was issued

by this court avoiding all liens, except for the liens of the Pennsylvania Department of Welfare, on the real property and the household furnishings and goods.

In an Answer to the Complaint, Household Finance raised a new matter, stating that it held a second mortgage on the real property; the debtor agreed that Household held a valid mortgage and the mortgage was not avoided. The issues to be resolved are: 1) Whether the lien of the Pennsylvania Department of Welfare is a judicial lien, security interest or statutory lien and if so, is it avoidable? Whether 11 U.S.C. §522(f) is unconstitutional if it is applied to avoid liens which were recorded prior to the passage of the Bankruptcy Code?

Both of these issues have been resolved by this Court in recent cases. The Court has held that the Department of Public Welfare liens are judicial liens and avoidable pursuant to 11 U.S.C. §522(f). See *In re Holt*, Bank. No. 79-1008, Adv. No. 80-851 (W.D. Pa. 1981) (opinion attached).

Secondly, in *In re Clark*, this Court held that the avoidance power under 11 U.S.C. §522(f) is not unconstitutional when it is applied retroactively. See *In re Clark*, Bank. No. 80-995, Adv. No. 80-950 (W.D. Pa. 1981) (opinion attached).

The debtor listed the real estate in question as having a market value of $15,000.00, a figure which has not been challenged by any of the parties. The property is in the name of the debtor. There are mortgages on the property totalling approximately $6452.00 and the debtor has taken a $7,900.00 exemption pursuant to 11 U.S.C. §522(d)(1) and (5). Therefore, except for $650.00, the welfare liens interfere with the

exemption and are avoided. The $650.00 that does not interfere with the exemptions is allowed to remain on the property.

An appropriate Order will be entered.

Dated at Pittsburgh, Pennsylvania this
18th day of June, 1981

(s) JOSEPH L. COSETTI
JOSEPH L. COSETTI
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

No. 81-75
Adversary No. 81-138

IN RE: DONALD EUGENE GARDNER, SR.,
Debtor

DONALD EUGENE GARDNER, SR.,
Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT CO.; and DAVID S. AUGUST, D.D.S.,
Defendants

ORDER OF COURT

AND NOW, this 18th day of June, 1981, upon the basis of the Memorandum Opinion of even date herewith, IT IS ORDERED that all the Pennsylvania Department of Public Welfare liens on the real property at 1005 East Hay Street, City of York, York County, Pennsylvania are AVOIDED pursuant to 11 U.S.C. §522(f)(1) exept for the $650.00 that does not interfere with the exemption.

(s) JOSEPH L. COSETTI
JOSEPH L. COSETTI
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

No. 79-1008
Adversary No. 80-851

IN RE: CAROLYN HOLT,
Debtor

CAROLYN HOLT,
Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,
Defendant

MEMORANDUM OPINION

FACTS

On December 10, 1979 the debtor, Carolyn Holt, filed a petition under Chapter 7 of the Bankruptcy Code. A complaint was filed by the debtor on October 6, 1980 under 11 U.S.C. §522(f) to avoid a judgment lien against real property of the debtor located at 338 Enright Court, Pittsburgh, PA 15206. The debtor alleges that this lien impairs an exemption to which the debtor is entitled under §522(d)(1) and (5). On

October 10, 1980 the defendant, the Commonwealth of Pennsylvania, Department of Public Welfare (hereinafter "D.P.W.") filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

The Commonwealth presented a brief in support of its Motion to Dismiss. Additionally, the Commonwealth requested an opportunity for oral argument.

On May 15, 1981 the matter was argued. The Commonwealth submitted a second brief and a supplemental brief. The plaintiff submitted a reply brief.

On April 21, 1980, subsequent to the debtor obtaining her interest in the subject real property, a judgment was recorded against her in the Court of Common Pleas of Allegheny County, Pennsylvania at No. G.D. 75-11092 in the amount of $2,000.00. The debtor has received public assistance of one type or another for several years. As of November 30, 1980 the debtor has received $4,885.90 in cash grants. In order to receive assistance the debtor was required by the D.P.W. to sign a Pa-9 Form. The stated purpose of this form, entitled "Reimbursement Agreement", is to give the D.P.W. a lien on any real property owned by the recipient. The Pa-9 form also contains a confession of judgment clause. At present the D.P.W. has one lien against the debtor's real property in the amount of $2,000.00.

Schedule B-1 of the debtor's petition listed the market value of the house located at 338 Enright Court, Pittsburgh, Pennsylvania at $24,500.00. A mortgage of $18,000.00 on the real property is in existence as of the time of filing of this petition. The

debtor claimed as exempt $6,500.00 of equity in the real property. There was no objection to the debtor's filing of the $6,500.00 exemption.

ISSUES

Is the welfare lien a security interest within the meaning of the Code and not a judicial lien?

Is the lien held by the D.P.W. against the debtor's property a statutory lien not subject to avoidance under 11 U.S.C. §545, or a judicial lien which can be avoided under 11 U.S.C. §522(f) to the extent it impairs the debtor's exemptions?

If the D.P.W. lien is a judicial lien, does it impair an exemption of the debtor?

Do considerations of federalism bar the application of §522(f) under Tenth Amendment considerations?

CONCLUSIONS OF LAW

To determine the status which the D.P.W. lien should be accorded under the Bankruptcy Code, the court must first look to the statutory authorization for this lien and the treatment of the D.P.W. lien in state court.

The D.P.W. lien resulted from the debtor's signing of a Pa-9 Form, "Reimbursement Agreement". The authority for a Pa-9 Form is derived from 62 P.S. §1974 entitled "Property of Persons Liable for expenses Incurred for Support and Maintenance." This statute in pertinent part states:

> "(a) ... the real and personal property of any person shall be liable for the expenses of his support and maintenance ... if such property was owned

> during the time such expenses were incurred.... Any public body or agency may sue the owner of such property for moneys so expended, and any judgment obtained shall be a lien upon the said real estate of such person and shall be collected as other judgments ..."

The D.P.W. sought to invoke the remedial provisions of 62 P.S. §1974 by a "petition and rule" procedure through use of the confession of judgment clause of Form Pa-9. A "petition and rule" is a one party proceeding whereby a party simply files a petition with the court and a ruling or judgment of the court is issued against the other party. A literal reading of 62 P.S. §1974, which specifically provides "any public body or public agency may sue ... for moneys so expended," leads to the conclusion that a suit to judgment is required. *Perkins v. Yellow Cab Co.*, 49 Pa. D. & C. 2d 297 (1970). The court in *Perkins* said the legislature had intended a more restricted view of the word "sue". The *Perkins* court felt that if the legislature had intended to include "petition and rule" as a means of enforcing the D.P.W. right of action created by 62 P.S. §1974, the legislature would have so provided. This reasoning is supported by the provisions made by the legislature at §3 of the Support Law of 193 , 62 P.S. §1973, specifically providing for "petition and rule" as a means of recovery. Title 62 P.S. §1973, which provides for the liability of relatives for the support of indigents, was passed by the legislature at the same time as 62 P.S. §1974. It appears that the legislature was aware of the procedural differences between the two sections and intended to create a unique type of judgment by preventing execution against the home or furnishings during the lifetime of the

assisted person, surviving spouse or dependent children. The view by the court in *Perkins, supra*, that the legislature intended to create a right of action specifically requiring a suit to judgment prior to reimbursement, is supported by an earlier decision in *Matter of Hoffman*, 38 Pa. D. & C. 2d 577 (1966). In *Hoffman* a young boy from a family receiving aid was struck by a car and damages were awarded. The state sought to recover the benefits of this Tort judgment through the use of 62 P.S. §1974. The court in *Hoffman* took the view that the claim by the state under 62 P.S. §1974 must be reduced to judgment.

In the case *Comm. Dept. of Public Welfare v. Livingood*, 22 Pa. Commw. Ct. 530, 349 A.2d 816 (1976), the court held that the D.P.W. must bring a suit by original process in the Court of Common Pleas in order to recover amounts above the ordinary $2,000.00 lien. In *Livingood, id.*, the parties did not raise the question of whether the amount covered by the $2,000.00 lien must be brought to judgment in Common Pleas court. For this reason the court does not address the question. In *Livingood*, the D.P.W. brought suit to collect reimbursement money owed to the state after a sheriff's sale by a third party. The court followed the reasoning of *Perkins, supra, Ryan v. Hockinberry*, 42 Pa. D. & C. 2d 578 (1967), and *Matter of Hoffman, supra*, in holding that a petition for a rule to show cause was not a proper procedure in suits for reimbursement under 62 P.S. §1974. The court in *Livingood, supra* at 818, adopted the exact language of Judge Cavanaugh's opinion in *Perkins*, rejecting the D.P.W.'s view that it, the D.P.W., could enforce its rights under 62 P.S. §1974 by petition and rule as well as a suit to judgment.

In *Ryan*, the court reviewed a related section, 62 P.S. §1975, which did not specifically provide for recovery through the use of petition and rule, and held that a proceeding by a one party petition was not authorized by the statute and therefore not allowed.

In a recent case, *Shearer v. Moore*, Pa. Super. Ct. , 419 A.2d 665 (1980), the Pennsylvania Superior Court cites and supports the decision in *Perkins* but lists execution of an "Agreement and Authorization to Pay a Claim" as one of the ways which the state can recover money paid in assistance to a recipient. The Pennsylvania Superior Court stated that the Pa-176K medical assistance reimbursement form (similar to a Pa-9 Form) is merely an affirmation of the statutory liability established by 62 P.S. §1974. *Congleton v. Pa. D.P.W.*, 48 Pa. Commw. Ct. 615, 409 A.2d 1382 (1980). The court cited *Congleton* and stated that the form "does not give the Commonwealth any position other than its rightful one as a common creditor and is not tantamount to legal process." The court did not specifically define what it meant by the use of the term "common creditor".

In the *Cogleton* case, *id.*, the court dealt with an attempt by the D.P.W. through the use of a Form Pa-176K to recover benefits due the recipient under a pending Pennsylvania Workmen's Compensation claim. Although the validity of the confession of judgment clause was not in issue, the *Congleton* court ruled that "the conditioning of continued eligibility upon the signing of the form (same as in the case of a Pa-9 Form) means that execution of the affirmation is certainly not voluntary."

The only court which allowed the D.P.W. to enforce its claim established by 62 P.S. §1974 solely by

petition and rule was an Orphans' Court. *Garrison's (Minors)*, 64 Pa. D. & C. 2d 433 (1974). The judge in *Garrison's* reasoned that petition and rule was sufficient because of the special power of the Orphans' Court to exercise the exclusive and mandatory jurisdiction in the administration and distribution of real and personal property of minors' estates, 20 P.S. §711 (1972).

The Bankruptcy Code defines three types of liens —statutory liens, judicial liens, and security interests. Section 101(27) of the Code defines a judicial lien as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." A statutory lien is defined by 11 U.S.C. §101(38) as a "lien arising solely by force of a statute on specified circumstances or conditions ... but does not include security interest or judicial lien whether or not such interest or lien is provided by or dependent on a statute and whether or not such interest or lien is made fully effective by statute." A security interest is defined in 11 U.S.C. §101(37) as a lien created by agreement. The court in *In re Brown*, 7 B.R. 479 (M.D. Pa. 1980), relying on the legislative history of the Code, H. Rep. No. 95-595, 95th Cong., 1st Sess. 312 (1977); S. Rep. No. 95-989, 95th Cong., 2nd Sess. 25 (1978); U.S. Code, Cong. & Adm. News 1978, p. 5787, ruled that "there are three kinds of liens; judicial liens, security interests and statutory liens and these categories are mutually exclusive and exhaustive except in the case of certain common law liens."

The definition of a statutory lien was not substantially changed by enactment of the new Bankruptcy Code. The legislative history of the Code confirms that 11 U.S.C. §101(38) was to have the same effect as

§1(29) of the Bankruptcy Act. S. Rep. No. 95-989, 95th Cong., 2nd Sess. 27 (1978); reprinted in 5 U.S. Code, Cong. & Adm. News 1979, pp. 5787, 5812 and 5813. Under the old Bankruptcy Act §1(29), a statutory lien by definition specifically excluded any lien provided by or dependent upon an agreement to give security whether or not such lien was provided by or dependent on a statute. Congress intended to assure by this section that consensual liens would not be subjected to any of the tests of validity prescribed by §67(c) which granted special treatment to statutory liens. H. Rep. No. 89-686, 89th Cong., 1st Sess. (1966); 2 U.S. Code, Cong. & Adm. News 1966, pp. 2442, 2460.

If a lien arises by force of statute without prior consent between the parties and does not fit the definition of a judicial lien, it will be deemed a statutory lien. After examining the statutory authority for a Pa-9 Form it is clear, based on the Code definition, that the D.P.W.'s lien is not a statutory lien. By its nature the D.P.W. lien is at best a security interest, because it appears to be an agreement (somewhat involuntary) between the parties or it is a judicial lien because of the necessity for use of legal process to bring the lien into existence. For these reasons the D.P.W. lien falls into one or both of the exceptions to a statutory lien as defined by 11 U.S.C. §101(38). *Charleston v. Wohlgemuth*, 332 F. Supp. 1175 (E.D. Pa. 1971), dealt with the constitutionality of the D.P.W. requiring the signing of a Pa-9 Form prior to receiving assistance. The court compared the New York State Welfare Department lien and ruled that the Pennsylvania D.P.W. lien is not a statutory lien.

The court in *In Re Dexter Buick-GMC Truck Co.*, 2 B.R. 242 (D. R.I. 1980), followed the definition in §1(29) and ruled that a "statutory lien" specifically excludes any lien provided by or dependent upon an agreement to give security. The court further stated that for a security interest to be present, the lien must be traceable to the property secured. It is evident in the instant case that there is some type of "agreement" between the parties and that the lien existing, as the D.P.W. argues, as of the time of signing, certainly is not traceable to the property. The Pa-9 Form makes no attempt to specifically identify any property.

A bankruptcy case which is very similar to the one at bar is *In re Natale*, 5 B.R. 454 (E.D. Pa. 1980). In *Natale*, the debtor received a loan from a police credit union. In order to obtain the loan, the debtor was required to sign a judgment note, a promissory note (with authorization to confess judgment), a consumer credit disclosure statement, and a statement of income in excess of $10,000.00. These forms were filed with the Prothonotary, who issued a *debet sine breve*, (hereinafter "D.S.B.") signifying a debt without suit or a confession of judgment. (The D.S.B. is the treatment which the state desires for its Pa-9 Form.) In *Natale*, the debtor filed a petition in bankruptcy and sought to avoid the lien. The credit union argued that the lien which arose by confession of judgment and D.S.B. was not a judicial lien but was a security interest which the parties had agreed should be created. The court in *Natale*, *id.* at 458, noted the differences between the lien definitions under the Code and stated:

While it is true that under the Code a security interest is a lien created by agreement of the parties, a judicial lien is defined as a lien obtained by other legal or equitable process or proceeding. We interpret that definition to include voluntary judicial process as well as involuntary judicial process.

The *Natale* court concluded that the lien the creditors had by virtue of a confession of judgment against the debtors was a judicial lien. The court ruled that the consumer credit disclosure form did not itself constitute such agreement, although the loan was secured by a separate security agreement on the debtor's real property. The court felt that the disclosure form did not specifically describe what real property was to secure the loan.

In the instant case, as in *Natale*, no lien arose solely by agreement of the parties. To acquire its lien, the D.P.W. at the very least had to file with the Prothonotary and confess judgment; this is judicial process according to the *Natale* court.

Another case with a factual situation almost identical to that of *Natale*, *In Re Porter*, 7 B.R. 356 (E.D. Pa. 1980), followed the same line of reasoning in concluding that a judicial lien was present.

The D.P.W. lien is not a statutory lien. Using the plain language of the Bankruptcy Code and recent court rulings, D.P.W. does not possess a security interest intended by Congress in enacting the Code. There was no voluntary intent of the debtor to create a security interest in his property. Further, to create a security interest under the Code, the intent of the parties must be clear, the property in which the interest is

to be created must be described with some degree of specificity, and one must be able to trace the specific property to the writing evidencing the security agreement. The D.P.W. Pa-9 Form is very general and does not describe specific property. The form states only that "my real and personal property is liable for repayment ..." Pennsylvania courts have held that this form constitutes only a general acknowledgment of the duty to reimburse the state. We hold that a lien arising under 62 P.S. §1974 is a judicial lien and therefore is subject to avoidance under §522(f)(1) of the Bankruptcy Code.

The D.P.W. urges the Court to find that the D.P.W. lien is a security interest because 1) it is not taken as part of the debt collection process; 2) the D.P.W. cannot execute upon its judgment; and 3) debtor has no personal liability on the judgment. For reasons similar to those discussed above, labeling this lien a security interest will not be dispositive of the issue. The lien intended here is a lien evidencing an interest in real property. As discussed above, in order to execute upon real property the D.P.W. lien must be reduced to judgment. It can have no more standing than a judgment by confession. See *Natale, supra*. The requirement of the Pennsylvania Uniform Commercial Code, 13 P.S. §§1101-9507, and Pennsylvania law on mortgages, 21 P.S. §§621-656, are not met by the welfare lien. It does not qualify as a security interest in specific property and as a lien is avoidable under §522(f)(1).

The Commonwealth raises considerations of federalism. It asks the Court to consider its interests in the welfare program as being in conflict with federal powers in bankruptcy. The Commonwealth did not

present evidence but the information is uniquely in the Commonwealth's possession; thus, for purposes of this argument, the Court will assume that the facts alleged in the Commonwealth's supplemental Brief at p. 17 are true. It recites that the Commonwealth holds $164 million in welfare liens and that $4 million of these liens are realized annually. The Commonwealth argues that the Tenth Amendment would require this Court to balance interests. It admits that the federal bankruptcy power is plenary. However, it argues that under *Commonwealth v. Liveright*, 308 Pa. 35, 161 A. 697 (1932) the administration of the public assistance program is "in the same position as the preservation of law and order" (Supplemental Brief, p. 16) and that welfare is a plenary state power. Further, the Commonwealth argues that under *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976), if a federal statute so disrupts a state in the performance of its basic and traditional governmental functions, then the statute will be limited. In *National League of Cities*, the Federal Wage and Hour Law was challenged as it applied to employees of state and local government in their essential functions.

The Commonwealth also urges this Court to be guided by *United Transportation Union v. Long Island Railroad*, 634 F.2d 19 (2nd Cir., 1980). In that case the application of the Federal Railway Labor Act to the State owned LIRR was questioned. The Commonwealth under the teachings of these cases asks this Court to find that §522(f) so frustrates the scheme of repayment which the Commonwealth chooses to utilize that it should be nonapplicable to the Commonwealth.

The debtor argues that the Commonwealth's obligation to provide welfare involves several billion dollars and that this repayment scheme is a miniscule portion of that system. The debtor argues that the repayment of a miniscule fraction of the total expenditure on welfare in no way frustrates the State welfare scheme. The debtor argues that a Wage and Hour Act is not enacted under an enumerated federal power.

In contrast, the scheme Congress enacted in the Bankruptcy Code of 1978, which creates in §522(d) a system of federal exemptions which are then further protected under §522(f) is a central part of that new Code. If a balancing test is to be utilized, the avoiding power of §522(f) is a central focus of the Code. In contrast, the welfare liens are a very small part of the state's welfare program.

We hold that the Commonwealth has not met the burden of demonstrating that the action of §522(f) so disrupts or frustrates the State in the performance of its welfare function that the §522(f) power should be limited. Here the plenary powers of the Congress to enact a bankruptcy code are challenged. A much heavier burden of interference with plenary State powers must be demonstrated if a balancing test is to be invoked. We find none here.

An appropriate Order will be entered.

Dated at Pittsburgh, Pennsylvania this
27th day of May, 1981

(s) JOSEPH L. COSETTI
JOSEPH L. COSETTI
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

No. 79-1008
Adversary No. 80-851

IN RE: CAROLYN HOLT,

Debtor

CAROLYN HOLT,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,

Defendant

ORDER OF COURT

AND NOW, this 27th day of May, 1981, upon the basis of the Memorandum Opinion of even date herewith, IT IS hereby ORDERED, ADJUDGED and DECREED that the foregoing Complaint to Avoid Judgment Liens is GRANTED.

(s) JOSEPH L. COSETTI
JOSEPH L. COSETTI
Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2898

DONALD EUGENE GARDNER SR., Debtor
(Bankruptcy No. 81-75)

DONALD EUGENE GARDNER SR.

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE, HOUSEHOLD FINANCE CONSUMER DISCOUNT CO., YORK FEDERAL CONSUMER DISCOUNT CO., AND DAVID S. AUGUST D.D.S.
INTERVENOR: UNITED STATES OF AMERICA

Commonwealth of Pennsylvania, Department of Public Welfare, Appellants

(D.C. Civil No. 81-1481)

On Appeal From the United States District Court for the Western District of Pennsylvania

Present: GIBBONS and HUNTER, *Circuit Judges* and LORD, *District Judge**

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* Honorable Joseph S. Lord, III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on July 27, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 21, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:
(s) Sally Mrvos
Clerk

August 11, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2898

DONALD EUGENE GARDNER, SR., Debtor
(Bankruptcy No. 81-75)

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE, HOUSEHOLD FINANCE CONSUMER DISCOUNT CO., YORK FEDERAL CONSUMER DISCOUNT CO., AND DAVID S. AUGUST D.D.S., INTERVENOR: UNITED STATES OF AMERICA

Commonwealth of Pennsylvania,
Department of Public Welfare,
Appellants

SUR PETITION FOR REHEARING

Present: Seitz, Chief Judge, Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter and Becker, *Circuit Judges* and Lord,* *District Judge*

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* Hon. Joseph S. Lord, III, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, on panel rehearing only.

The petition for rehearing filed by appellants in the aove entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) JOHN J. GIBBONS
Judge

Dated: Sep -9 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Bankruptcy No. 81-75
Adversary No. 81-138

IN RE: DONALD EUGENE GARDNER, SR.
Debtor

DONALD EUGENE GARDNER, SR.
Plaintiff

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT CO.; and DAVID S. AUGUST, D.D.S.
Defendants

AGREED STATEMENT OF THE RECORD

Donald Eugene Gardner, Sr. and the Commonwealth of Pennsylvania, Department of Public Welfare, acting by and through their respective counsel, hereby stipulate and agree to the following statements of fact which shall be used to supplement the record certified to the Court:

1. Plaintiff below and appellee is Donald Eugene Gardner an individual (hereinafter "Mr. Gardner").

2. Defendant below and appellant is the Commonwealth of Pennsylvania, Department of Public Welfare (hereinafter "DPW").

3. On January 15, 1981, Mr. Gardner filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code.

4. On or about January 20, 1981, Mr. Gardner filed a Complaint to Avoid Liens held by DPW.

5. The liens Mr. Gardner sought to avoid result from confessed judgments recorded at the York County, Pennsylvania courthouse. The date of recording, recording number, amount of lien and date of revival for each of the judgments is as follows:

Date Recorded	Recording Number	Amount	Revival Date
Oct. 30, 1972	678 October Term 1972	$2,000	May 27, 1977
March 4, 1974	1246 January Term 1974	$2,000	Nov. 14, 1978
March 4, 1974	1247 January Term 1974	$2,000	Nov. 14, 1978
July 29, 1974	2250 May Term 1974	$2,000	Feb. 14, 1979
March 13, 1975	1625 January Term 1975	$2,000	Nov. 2, 1979
Feb. 27, 1976	76N 1059	$2,000	

6. Each of the above judgment liens was obtained by filing of a form Pa-9 identical to the one attached hereto as Exhibit A. Each of the form Pa-9s recorded were signed by Mr. Gardner and his wife Mary Ann Gardner.

7. Mr. Gardner owns real property in York County which is subject to the DPW liens.

8. Except for the sum of $650, the DPW liens impair an exemption to which Mr. Gardner is entitled under 11 U.S.C. §522.

9. Prior to the filing of Mr. Gardner's bankruptcy petition, he and his legal dependents had received $19,294.68 in public assistance in the AFDC category.

(s) Joseph Colavecchi
Joseph Colavecchi
2 East Market Street
P. O. Box 1028
Clearfield, PA 16830

(Attorney for Plaintiff)

(s) Jason W. Manne
Jason W. Manne
Assistant Counsel
Department of Public Welfare
Rm. 323 Health & Welfare Bldg.
Harrisburg, PA 17120
(Attorney for DPW)

EXHIBIT "A"

Record No. _____
Name _____
Address _____

REIMBURSEMENT AGREEMENT

I,
of _____ County, Pennsylvania, acknowledge that my real and personal property is liable for the repayment of public assistance (except Blind Pension) granted or to be granted to or for me and/or to or for my spouse and unemancipated minor children. It is understood that this liability does not apply to assistance received before my acquisition of such property, nor to assistance for which service is rendered in the Relief Work Program of the Department of Public

Welfare. The purpose of this agreement is to give the Department of Public Welfare a lien on any real property owned wholly or in part by me while assistance was received as above.

In order to carry out the purpose of this agreement, I authorize the Prothonotary, or any Attorney, of any Court of Record of Pennsylvania, or elsewhere, to appear and to enter judgment against me for the sum of Two Thousand Dollars ($2,000.00), plus costs. This judgment shall be a lien upon my real property, and be collected as other judgments, except as to the real and personal property comprising my home and furnishings, which home shall be subject to the lien of such judgment, but shall not be subject to execution on such judgment during my lifetime, or the lifetime of my spouse or dependent children. It is further agreed that in the event the sum of Two Thousand Dollars ($2,000.00) exceeds the amount required for repayment of assistance as set forth above, my real property shall not be liable for any greater payment than the amount of assistance received, plus costs.

It is agreed that at any time after assistance has ceased, the Department of Public Welfare will, at my written request, furnish me with a stipulation to be filed with the Prothonotary of the court having record of this judgment, setting forth the exact amount of assistance received for which my real property is liable, if such amount is less than the sum of Two Thousand Dollars ($2,000.00).

Signed, sealed and
delivered in the presence
of

_____ _____ (SEAL)
Dated _____

_____ _____ (SEAL)
Dated _____

Commonwealth of Pennsylvania PA 9-2-70(100)
Department of Public Welfare

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

In Proceedings Under Chapter 7
Bankruptcy No. 81-0075
Adversary No. 81-138

IN RE: DONALD EUGENE GARDNER, SR.,
Debtor

DONALD EUGENE GARDNER, SR.,
Plaintiff

VS

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT COMPANY; DAVID S. AUGUST, D.D.S.
Defendants

COMPLAINT TO AVOID LIENS

The Complaint of Donald Eugene Gardner, Sr., of Box 137, Houtzdale, Pennsylvania, 16651, respectfully represents:

1. This case was commenced by the filing on January 15, 1981 of a voluntary petition for relief

under Chapter 7 of Title 11 of the United States Bankruptcy Code.

2. This Complaint is filed by the Debtor under 11 USC 522(f) to avoid judicial liens on the house and lot situated in the City of York, York County, Pennsylvania, having been conveyed to Donald E. Gardner by deed recorded at York County in Deed Book 81P, Page 522 - 10905; also, to avoid a nonpossessory, nonpurchase-money security interest in all household furnishings and household goods owned by Debtor.

3. Judgment was entered against Debtor by the Commonwealth of Pennsylvania, Department of Public Welfare, P.O. Box 2675, Harrisburg, Pennsylvania 17120 on October 30, 1972, revived on May 27, 1977 in the amount of $2,000.00 and having File No. 676, October Term, 1972; on March 4, 1974, revived on November 14, 1978, in the amount of $2,000.00 and having File No. 1246, January Term, 1974; on March 4, 1974, revived on November 14, 1978, in the amount of $2,000.00 having File No. 1247, January Term, 1974; on July 29, 1974, revived on February 14, 1979, in the amount of $2,000.00, having File No. 2250, May Term, 1974; on March 13, 1975, revived on November 2, 1979, in the amount of $2,000.00 having File No. 1625, January Term, 1974; and on February 27, 1976 in the amount of $2,000.00 having File No. 76N 1059. All of the above judgments were entered of record at the York County Courthouse, York, Pennsylvania.

4. On November 17, 1976, Household Finance Consumer Discount Co. of 121 West Market Street, York, Pennsylvania 17405 entered a financing statement of record at the York County Courthouse against

Donald E. Gardner, Sr., and Maryann Gardner having File #1101, Pg. 276, Bl. 1, Book 49, covering all consumer and household goods located at 1005 Hay Street, York, Pennsylvania 17403, and which are owned by Debtor.

5. On February 28, 1978, York Federal Consumer Discount of 23 East King Street, York, Pennsylvania 17401, entered a financing statement of record at the York County Courthouse against Donald E. Gardner, Sr., and Mary Ann Gardner, having File #256, Pg. 64, Bl. 4, Book 58.

6. On March 5, 1980, York Federal Consumer Discount Company of 23 East King Street, York, Pennsylvania 17401, entered a financing statement of record at the York County Courthouse against Donald E. Gardner, Sr., having File #465, Pg. 115, Bl. 1, Book 62, covering all household and consumer goods of Debtor.

7. On January 9, 1980, David S. August, D.D.S., of Prospect Road Professional Center, 871 Clare Lane, York, Pennsylvania 17402, entered judgment against Donald Gardner in the amount of $125 having File #79-S-3827 at the York County Courthouse.

8. The judgments which have been entered in favor of Commonwealth of Pennsylvania, Department of Public Welfare; Household Finance Consumer Discount Company; York Federal Consumer Discount Company; and David S. August, D.D.S., at the Court of Common Pleas of York County, Pennsylvania would form such a lien on Debtor's equity in his house and lot, and household and consumer goods, as to impair his exemption to which the Debtor would be entitled under 11 U.S.C. 522(d).

WHEREFORE, Plaintiff prays judgment against Defendants for the cancellation and avoidance of the judicial liens against his house and lot situated in York, York County, Pennsylvania, and against the nonpossessory, nonpurchase-money security interest in his household goods and furnishings, and for such other and further relief as is just.

(s) JOSEPH COLAVECCHI
JOSEPH COLAVECCHI, ESQUIRE
Attorney for Debtor/Plaintiff

Date: January 20, 1981

Commonwealth of Pennsylvania :
: SS.
County of Clearfield :

Before me, the undersigned officer, personally appeared JOSEPH COLAVECCHI, who, being duly sworn according to law, deposes and says that he is attorney for Donald Eugene Gardner, Sr., and that he has personally investigated the averments set forth in the foregoing Complaint to Avoid Liens and that all of the averments are true and correct to the best of his knowledge, information and belief.

(s) JOSEPH COLAVECCHI
JOSEPH COLAVECCHI

Sworn to and subscribed before me
this 20th day of January, 1981.
(s) Gary W. Fisher
Gary W. Fisher, Notary Public
Clearfield, Clearfield Co., Pa.
My Commission expires Nov. 23, 1981

ORIGINAL

RECEIVED
NOV 15 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 82-659

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

v.

DONALD EUGENE GARDNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE FOX
ERIC L. FRANK
Counsel for Respondent

Community Legal Services, Inc.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the judgment liens held by petitioner were judicial liens within the meaning of 11 U.S.C. §522(f)(1) of the Bankruptcy Reform Act of 1978?

2. Did the Court of Appeals err in holding that Congress intended, under the Bankruptcy Reform Act, to treat judicial liens held by governmental creditors in the same manner as judicial liens held by nongovernmental creditors?

3. Did the Court of Appeals err in holding that Congress has the power in bankruptcy proceedings to treat judicial liens held by governmental creditors in the same manner as judicial liens held by nongovernmental creditors?

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NO. 82-659

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

v.

DONALD EUGENE GARDNER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

SUMMARY OF ARGUMENT

This litigation raises the narrow question of whether petitioner's liens against respondent's real property were properly classified as "judicial liens" and therefore could be avoided under the relevant provisions of the Bankruptcy Code. The Court of Appeals below joined with all the bankruptcy courts in Pennsylvania and found that petitioner's liens, which arose upon the entry of a confessed judgment, were within the statutory definition of judicial

lien. This question has not been decided outside of Pennsylvania and has very limited importance outside of Pennsylvania. Therefore, it is not of sufficient public importance to warrant review by this Court.

The other question posed by this litigation is whether Congress intended to and had the authority to subject a governmental creditor to the lien avoidance provisions of the Bankruptcy Code. The Court of Appeals below decided the issue of intent by carefully examining the statute and its legislative history and reached a conclusion completely consistent with the two other Courts of Appeals decisions which have subjected governmental creditors to Bankruptcy Code provisions. The issue of Congressional authority was decided by reference to the plenary power of Congress to establish uniform bankruptcy laws as well as those decisions of this Court which affirmed the power of Congress to abrogate state immunity in certain circumstances.

Since the decision of the Court of Appeals is in complete accord with the decisions of this Court, in harmony with the decisions of other Circuit Courts of Appeals, and is of limited public importance, the Petition for Certiorari should be denied.

II.

ARGUMENT

A. THE HOLDING THAT PETITIONER POSSESSED JUDICIAL LIENS WITHIN THE MEANING OF THE BANKRUPTCY REFORM ACT IS NOT IN CONFLICT WITH ANY OTHER DECISION NOR IS IT OF SUFFICIENT PUBLIC IMPORTANCE TO WARRANT GRANTING THIS PETITION FOR CERTIORARI

In this case, the Court of Appeals joined every Pennsylvania court which has considered the question in holding that the confessed judgments held by petitioner, Department of Public Welfare ("DPW"), are "judicial liens" within the meaning of section 522(f)(1) of the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"), 11 U.S.C. §522(f)(1). This holding was based upon the statutory definition of "judicial lien" as well as relevant Pennsylvania statutes, regulations, and common law principles which give rise to DPW's liens. This Court should decline DPW's invitation to review this holding for not only it is clearly correct and consistent with the decisions of every other court, but the issue is of very limited public significance beyond Pennsylvania.

Section 522(f)(1) of the Bankruptcy Code provides:

> (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is —
>
> (1) a judicial lien; ....

This section is one of the new code provisions designed to protect the statutory exemptions offered to each debtor in sections 522(b), (d), as a means of insuring that each debtor receives a "fresh start" after bankruptcy. See H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 118 (1977); In re Giles, 18 B.R. 708 (E.D. Tenn. 1982). Afraid that the statutory exemptions found in the Code might be lost to creditors with overly broad security interests against a debtor's property, Congress provided debtors with the power to avoid a type of security interest, denoted as a "judicial lien," to the extent that this type of lien impaired an exemption of the debtor. See Report of Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93rd Cong. 1st Sess., Part I, at 173, 180 (1973); id., Part II at 124, 131 (1973).

The definition of "judicial lien" is found in the Code at 11 U.S.C. §101(27) as a:

> lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

Since the parties agreed that all but $650.00 of DPW's liens impaired Mr. Gardner's exemptions as set forth in §522(d) of the Code, the question below was whether these liens fell within the statutory definition of judicial lien.

The lien in issue arose from the entry of six confessed judgments against Mr. Gardner in York County, Pennsylvania. As a condition of receiving benefits, Mr. Gardner was required to sign

a reimbursement agreement which contains a confession of judgment agreement. 55 Pa. Code §§257.21(a),(b); 257.23(b); 257.24(b). The Pennsylvania statute upon which this requirement is based does not contain any mention of confessed judgments. Rather, state law authorizes DPW to obtain reimbursement by commencing a lawsuit and obtaining a judgment which "shall be a lien," as are other judgments. Act of June 24, 1973, P.L. 2043, §4, as amended, 62 P.S. §1974. However, to save itself the time and expense of bringing suit, DPW administratively requires every homeowner seeking assistance to sign a reimbursement agreement with a confession of judgment clause.[1/]

Under Pennsylvania law all recorded judgments act as a lien against all real property owned by the judgment debtor at the time of entry of the judgment and in the county in which the judgment is recorded. 42 Pa. C.S.A. §4304. This judgment lien arises whether entered by consent, confession, default, or after litigation. 20 P.L.E. Judgments §362, at 499-500 (1959). See Lauffer v. Cavett, 87 Pa. 479 (1878)(confessed judgment gives rise to a judgment lien). Moreover, the lien arises only upon entry of the judgment. See In re Fortesque, 122 F. Supp. 883 (E. D. Pa. 1954); In re Fell, 18 F. Supp. 986 (E.D. Pa. 1937). Thus, DPW's regulations recognize that entry of judgment by confession

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1/ Reimbursement suits are brought against recipients who have failed to sign confession of judgment agreements, see 55 Pa. Code §257.24(i)(4)(i)(A), and when reimbursement is sought from personal property. See Shearer v. Moore, 277 Pa. Super. 70, 419 A.2d 665 (1980).

yields the very same judgment lien as would result from the successful completion of a lawsuit against the recipient. 55 Pa. Code §§257.24(b)(1)(i); 257.24(i)(4)(i)(A).

Since DPW's liens arose from the entry of confessed judgments, every Pennsylvania bankruptcy court to consider the issue, (as well as the District Court below in this case), has quickly concluded that these liens are judicial liens within the meaning of the Code. In re Esser, 20 B.R. 178 (Bky. E.D. Pa. 1982); In re Hiles, 19 B.R. 856 (Bky. W.D. Pa. 1982); In re Hoffa, 17 B.R. 699 (Bky. E.D. Pa. 1982); In re Taylor, 17 B.R. 586 (Bky. W.D. Pa. 1982); In re Graham, 15 B.R. 1010 (Bky. E.D. Pa. 1981); In re McKay, 15 B.R. 1013 (Bky. E.D. Pa. 1981); In re Galbraith, 15 B.R. 549 (Bky. E.D. Pa. 1981); In re DiRoderico, 17 B.R. 70 (Bky. W.D. Pa. 1981); In re Griggs, 12 B.R. 443 (Bky. E.D. Pa. 1981); In re Waite, 11 B.R. 608 (Bky. M.D. Pa. 1981); In re Holt, 11 B.R. 797 (Bky. W.D. Pa. 1981).

Respondent is not aware of any case outside of Pennsylvania which discusses the avoidability of a welfare lien. There seem to be two reasons for this absence. First, the vast majority of states do not take reimbursement liens upon the property of welfare recipients. Second, those states that do take such a lien, such as New York and Connecticut, do so by mortgage rather than by confessed judgment. See, e.g., Hedge v. Department of Social Services of Nassau County, 62 Misc. 2d 834 (Sup. Ct. N.Y. 1970) (construing N.Y. Social Service Law §106). Since a mortgage is

not a judgment lien, the issue presented in this lawsuit does not arise.[2/]

Therefore, given the limited applicability of this bankruptcy question outside of Pennsylvania and the uniformity of decision reached by the lower courts, this Court should not grant certiorari on this question.

B. THE COURT OF APPEALS' CONCLUSION THAT CONGRESS INTENDED AND HAS AUTHORITY TO PROVIDE FOR THE AVOIDANCE OF JUDICIAL LIENS HELD BY GOVERNMENTAL CREDITORS IS CONSISTENT WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS AND THE DECISIONS OF THIS COURT.

DPW has also requested that this Court review the second prong of the Court of Appeals' decision — that Congress intended to and has the authority to subject states to the lien avoidance procedures of §522(f). Again, this Court should decline the invitation to review this holding because it is consistent with the decisions of this Court as well as of other Courts of Appeals and is therefore insubstantial.

The Court of Appeals concluded that Congress intended to include governmental creditors within the purview of §522(f) by examining the provisions of section 106(c)[3/] of the Code, the

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2/ In other jurisdictions, which permit the entry of a judgment by confession, bankruptcy courts have held that the lien that arises from the entry of judgment is a judicial lien. See In re Tarrant, 19 B.R. 360 (Bky. D. Alaska 1982); In re Pitre, 11 B.R. 777 (Bky. N.D. Ill. 1981).

3/ Section 106(c) states:

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity — (cont. on p. 8)

relevant legislative history, and other Code provisions. The Court of Appeals first looked to §106(c) for in that section Congress specifically addressed the waiver of states' immunity.

Congress provided in §106(c) that any Bankruptcy Code provision applicable to nongovernmental creditors is equally applicable to governmental creditors, notwithstanding any assertions of immunity. The appropriate inquiry, therefore, is whether the substantive Code provision binds private creditors. If so, it binds governmental creditors as well.

There is no doubt, and DPW does not dispute, that the Code's judicial lien avoidance provision, 11 U.S.C. §522(f), applies to nongovernmental creditors. However, DPW asserts that the Court of Appeals erred and that Congress did not intend to subject the states to suit or avoid liens held by governmental creditors because 11 U.S.C. §522(f) lacks a specific reference to creditors or governmental creditors. In so arguing, DPW overlooks an abundance of evidence which supports the Court of Appeals' conclusion.

First, the legislative history confirms that Congress intended to subject all governmental creditors to lien avoidance proceedings under 11 U.S.C. §522(f):

3/ Continued

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

> Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir. 1975), and in re Dolard, 519 F.2d 282 (9th Cir. 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim.... [S]ubsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit....4/ (Emphasis added)

124 CONG. REC. S 17407 (daily ed. Oct. 6, 1978)(remarks of Sen. DeConcini); 124 CONG. REC. H 11091 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards).

Second, while section 522(f) does not mention the word "creditor," the absence of that word is the sole result of drafting style since that section focuses on the interest of the debtor to be protected without regard to the entity holding the interest. When Congress stated that the debtor "may avoid the fixing of a lien," it could only be referring to a lien held by a "creditor" of the debtor. Thus, the term "creditor" is implied in section 522(f). To argue otherwise, as DPW does, produces the following conflict within the Code which Congress could not have intended.

4/ The debtor in possession for these purposes is equivalent to the debtor. See 11 U.S.C. §1101(1).

Under section 522(e)[5] any waiver of exemption, or of the right to avoid liens impairing exemptions, is unenforceable. This provision expressly uses the word "creditor" and by virtue of section 106(c) therefore applies to governmental and nongovernmental creditors. It would make no sense for Congress to forbid a governmental creditor from obtaining from the debtor a waiver of the debtor's right to avoid a lien impairing his exemptions unless the debtor could also avoid such lien.

Thus, given the purpose of section 106(c), its legislative history, and the need to construe a statute so as to give effect to congressional intent, see, Philbrook v. Glodgett, 421 U.S. 707 (1975), the Court of Appeals properly concluded that Congress intended to bring governmental creditors within the reach of section 522(f). See Hutto v. Finney, 473 U.S. 678 (1978).

While no other Circuit Court of Appeals has had occasion to reach the very issue presented by this lawsuit, two other Courts of Appeals have interpreted 11 U.S.C. §106(c) in a manner completely consistent with the decision below. The discharge

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5/ Section 522(e) provides:

> A waiver of exemptions executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

provisions of 11 U.S.C. §524, like section 522(f), lack any specific reference to creditors. Yet both the Second Circuit and Seventh Circuit have not hesitated to hold that Congress intended to bind all creditors, both governmental and private creditors, to the provisions of section 524. In re Neavear, 674 F.2d 1201 (7th Cir. 1982); In re Glidden, 653 F.2d 85 (2d Cir. 1981).

Since only the Third Circuit Court of Appeals has reached the question of the applicability of section 522(f) to governmental creditors, and has decided that issue consistent with the interpretation of section 106(c) provided by the only other Circuit Courts to interpret that statutory provision, this Court should deny petitioner's request for certiorari on the question.

Finally, DPW also questions whether Congress has the power, consistent with the Eleventh Amendment, to subject states to lien avoidance proceedings in bankruptcy court. Certainly, the power of Congress to abrograte state immunity, at least in certain circumstances, cannot be questioned any longer. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964). In providing for lien avoidance proceedings, Congress has acted under its plenary bankruptcy power pursuant to article I, section 8 of the Constitution. This Court and every Circuit Court which has considered the issue have recognized that Congress may establish a federal cause of action against the states with enforcement in

federal court when acting pursuant to its power under Article I, section 8. See Parden v. Terminal Railway of Alabama State Docks Department, supra; Peel v. Florida Department of Transportation, 600 F. 2d 1070 (5th Cir. 1979); Jennings v. Illinois Office of Education, 589 F.2d 935 (7th Cir.), cert. denied, 441 U.S. 967 (1979). See generally, Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203 (1978); Tribe, Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682 (1976).

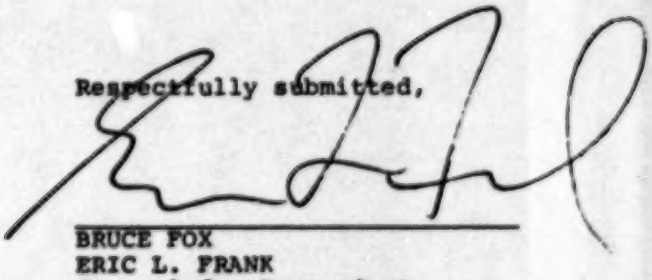
This Court has already held that Congress has authority to grant a Bankruptcy Court jurisdiction to determine the validity of state held liens in bankruptcy proceedings. Gardner v. State of New Jersey, 329 U.S. 565 (1946); Van Huffel v. Harkelrode, 284 U.S. 225 (1931). Thus, the question raised by DPW is insubstantial and does not merit this Court's review.

III.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari in this case should be denied.

Respectfully submitted,



BRUCE FOX
ERIC L. FRANK
Counsel for Respondent

Community Legal Services, Inc.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134-2483
(215) 427-4850

DATED: November 12, 1982

No. 82-659

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OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,

Petitioner,

v.

DONALD EUGENE GARDNER,

Respondent.

AFFIDAVIT OF SERVICE

I, BRUCE FOX, ESQUIRE, being duly sworn according to law hereby state that I am a member of the bar of the Supreme Court and that on this date completed copies of Respondent's Motion to Proceed in Forma Pauperis and Respondent's Brief in Opposition to Petition for Writ of Certiorari were forwarded by First Class Mail, Postage Prepaid as follows:

10 copies to: Alexander L. Stevas, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543

2 copies to: Jason W. Mann, Esquire
Jonathan Vipond, III, Esquire
Counsel for Petitioner
Office of Legal Counsel
Department of Public Welfare
Room 323 Health & Welfare Bldg.
Harrisburg, PA 17120

2 copies to: Solicitor General
Department of Justice
Washington, DC 20530

2 copies to: Judith K. Giltenboth, Esquire
Assistant United States Attorney
633 U. S. Post Office & Courthouse
Seventh Avenue & Grant Streets
Pittsburgh, PA 15219

To my knowledge, the mailing took place on this date within the permitted time.

Nov. 12 1982
DATED

Bruce Fox
BRUCE FOX

Sworn to and Subscribed
before me this 12th
day of November 1982.

Frances E. Conwill
Notary Public

FRANCES E. CONWILL
Notary Public, Phila., Phila. Co.
My Commission Expires March 6, 1985

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NO. 82-659

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1982

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE

Petitioner,

v.

DONALD EUGENE GARDNER

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

BRUCE FOX
ERIC L. FRANK
Counsel for Respondent

COMMUNITY LEGAL SERVICES, INC.
LAW CENTER NORTHEAST
3156 Kensington Avenue
Philadelphia, PA 19134
(215) 427-4850

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DEPARTMENT OF PUBLIC WELFARE

Petitioner,

v.

DONALD EUGENE GARDNER

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The Petitioner, Donald Eugene Gardner, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit and to proceed in forma pauperis pursuant to Rule 46.

Petitioner, as appellee in the courts below, did not seek leave to proceed in forma pauperis in the District Court, or in the Court of Appeals.

The Petitioner's affidavit in support of this Motion is attached hereto.

BRUCE FOX
ERIC L. FRANK
Attorneys for Petitioner

COMMUNITY LEGAL SERVICES, INC.
LAW CENTER NORTHEAST
3156 Kensington Avenue
Philadelphia, PA 19134
(215) 427-4850

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE

Petitioner,

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Donald Eugene Gardner, being duly sworn, deposes and says that I am the Respondent in the above-entitled case; that in support of my motion to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this petition are true.

1. Are you presently employed?

No. I was last employed in 1974, earning $600.00 per month.

2. Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

My sole income is derived from Social Security Disability.

3. Do you own any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

David Alan Gardner, son, age 13

I UNDERSTAND THAT A FALSE STATEMENT OR ANSWER TO ANY QUESTIONS IN THIS AFFIDAVIT WILL SUBJECT ME TO PENALTIES FOR PERJURY.

Donald Eugene Gardner

DONALD EUGENE GARDNER

Sworn to and subscribed before me this 1st day of Nov 1982

Lois N. Lobb

LOIS N. LOBB, NOTARY PUBLIC
HOUTZDALE BORO, CLEARFIELD COUNTY
MY COMMISSION EXPIRES JULY 14, 1984
Houtzdale, Pennsylvania, Member, Pennsylvania Association of Notaries